

**United States Department of Labor
Employees' Compensation Appeals Board**

D.H., Appellant)	
)	
and)	Docket No. 18-0042
)	Issued: March 16, 2018
DEPARTMENT OF DEFENSE, FINANCE & ACCOUNTING SERVICE, Indianapolis, IN, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 6, 2017 appellant filed a timely appeal from an August 4, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated May 9, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

FACTUAL HISTORY

On August 15, 2005 appellant, then a 44-year-old staff accountant, filed a traumatic injury claim (Form CA-1) alleging a right hand/finger injury on August 11, 2005. She claimed

¹ 5 U.S.C. § 8101 *et seq.*

that her right hand, including her right fifth finger (little finger), became caught in a file cabinet drawer when the cabinet fell forward and she attempted to stop it. Appellant did not stop work.

Appellant was seen in an emergency room on August 15, 2005 and, on the next day, she began to receive treatment for her right hand/finger condition from Dr. Douglas A. Kuhn, an attending Board-certified orthopedic surgeon. Dr. Kuhn placed a cast on her right fifth finger and recommended restrictions such as no lifting of more than five pounds with the right hand.

OWCP accepted that appellant sustained a crushing injury of right finger(s) and closed fracture of right fifth finger phalanx.

Appellant stopped work August 24, 2005 and Dr. Kuhn performed surgery on that date including open reduction/internal fixation on the proximal phalanx of her right fifth finger. The surgery was approved by OWCP.²

On September 2, 2005 appellant returned to work for the employing establishment with a restriction of no use of her right hand. On October 7, 2005 she resumed her regular work duties without restriction.³

Appellant reported range of motion problems with her right fifth finger and stopped work on January 12, 2006. Dr. Kuhn performed an OWCP-approved surgical manipulation and lysis of adhesions on her right fifth finger on that date. On February 28, 2006 appellant returned to work without restrictions.

On March 22, 2006 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted employment conditions.

In an August 4, 2006 decision, OWCP granted appellant a schedule award for 62 percent permanent impairment of her right thumb.⁴ The award ran from April 27, 2006 to March 18, 2007, and it was based on an April 27, 2006 permanent impairment rating of Dr. Kuhn and a July 5, 2006 permanent impairment rating of an OWCP medical adviser.⁵

On December 17, 2015 appellant filed a notice of recurrence (CA-2a) alleging that, on April 15, 2015, she sustained a recurrence for “Medical Treatment Only” which was necessitated by her accepted medical conditions. She asserted that she had experienced swelling in her right fifth finger since the August 11, 2005 employment injury. At the time appellant filed her claim for a recurrence of the need for medical treatment, the record did not contain any medical evidence dated after mid-2006.

² Appellant used leave to cover her period of work stoppage and later received leave buy back monies.

³ In an October 27, 2005 report, Dr. Kuhn declared that the break of appellant’s right fifth finger was “totally healed.”

⁴ The Board notes that OWCP misidentified the scheduled member in its schedule award decision, as it should read right fifth finger.

⁵ Appellant received schedule award compensation on the daily rolls beginning April 27, 2006 and on the periodic rolls beginning July 9, 2006. OWCP later expanded the accepted conditions to include tenosynovitis of the right hand/wrist and joint ankylosis of the right hand.

In a February 17, 2016 letter, OWCP requested that appellant submit additional factual and medical evidence in support of her claim for a recurrence of the need for medical treatment. In a March 15, 2016 statement, appellant reported that in April 2015 she visited an attending physician after experiencing increased symptoms in her right hand.

In a May 9, 2016 decision, OWCP denied appellant's claim for a recurrence of the need for medical treatment. It found that she did not submit sufficient medical evidence to establish the need for medical treatment related to her accepted employment conditions.

In a letter received on May 10, 2017, appellant requested reconsideration of OWCP's May 9, 2016 decision. She indicated that she was providing additional documentation, not previously submitted, which established her need for additional medical treatment due to worsening of her accepted work-related conditions.

Appellant submitted an undated, three-page document which contains the signature of Dr. Nilda Durany, an attending Board-certified family practitioner, and of Paul Mattox, an attending physician assistant. However, other than the signatures, the report is comprised of seemingly arbitrary symbols and does not contain any recognizable words. Appellant also submitted an undated, unsigned one-page document, bearing the title, "Letter of Reconsideration," which has words in place of the symbols found on the first page of the above-noted document produced by Dr. Durany and Mr. Mattox. The document contains a history of her August 11, 2005 employment injury and limited findings from an examination conducted on an unspecified date.⁶ In the history section, it was noted that appellant had a cyst growing from 2005 until 2016 when Dr. Kuhn removed a large ping pong ball size cyst from the second digit of the right hand (index finger). It was also indicated that the "continued right hand and finger injuries are directly related to the accident on 'May 11, 2005,'⁷ while working for the department [of] finance and accounting service in Indianapolis, Indiana."

By decision dated August 4, 2017, OWCP denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error. It found that her request for reconsideration was untimely filed as it was not received until May 10, 2017, more than one year after issuance of its May 9, 2016 merit decision. OWCP further determined that the evidence appellant submitted in support of her untimely reconsideration request did not demonstrate that it erred in its May 9, 2016 decision.

LEGAL PRECEDENT

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether it will review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application. The Secretary, in accordance with the facts found on review, may end, decrease or increase the compensation awarded; or award compensation previously refused or discontinued.⁸

⁶ The document lists the "Date of Initial Visit" as April 20, 2017, but it does not list the date of the examination findings contained therein. It does not list any findings for appellant's right hand.

⁷ The Board notes that the date of injury is August 11, 2005.

⁸ 5 U.S.C. § 8128(a).

OWCP, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, section 10.607(a) of the implementing regulations provide that an application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.⁹ However, OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation, if the claimant's application for review demonstrates clear evidence of error on the part of OWCP in its most recent merit decision. To demonstrate clear evidence of error, a claimant must submit evidence relevant to the issue that was decided by OWCP. The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.¹⁰

To demonstrate clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflicting medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.¹¹ The Board notes that clear evidence of error is intended to represent a difficult standard.¹² Evidence that does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to demonstrate clear evidence of error.¹³ It is not enough merely to establish that the evidence could be construed so as to produce a contrary conclusion.¹⁴ This entails a limited review by OWCP of the evidence previously of record and whether the new evidence demonstrates clear error on the part of OWCP.¹⁵ The Board makes an independent determination as to whether a claimant has demonstrated clear evidence of error on the part of OWCP.¹⁶

ANALYSIS

The Board finds that OWCP properly determined that appellant failed to file a timely request for reconsideration. An application for reconsideration must be received within one year of the date of OWCP's decision for which review is sought.¹⁷ As appellant's request for reconsideration was not received by OWCP until May 10, 2017, more than one year after issuance of its May 9, 2016 merit decision, it was untimely filed. Consequently, she must demonstrate clear evidence of error by OWCP in its May 9, 2016 decision.

⁹ 20 C.F.R. § 10.607(a).

¹⁰ *Id.* at § 10.607(b); *Fidel E. Perez*, 48 ECAB 663, 665 (1997).

¹¹ *Annie L. Billingsley*, 50 ECAB 210 (1998).

¹² *R.K.*, Docket No. 16-0355 (issued June 27, 2016).

¹³ *Jimmy L. Day*, 48 ECAB 652 (1997).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Cresenciano Martinez*, 51 ECAB 322 (2000); *Thankamma Mathews*, 44 ECAB 765, 770 (1993).

¹⁷ *See supra* note 9.

The Board further finds that appellant has not demonstrated clear evidence of error on the part of OWCP in issuing its May 9, 2016 decision.

Appellant failed to submit the type of positive, precise, and explicit evidence which manifests on its face that OWCP committed an error in its May 9, 2016 decision.¹⁸ In its May 9, 2016 decision, OWCP denied her claim for a recurrence, finding that she did not submit sufficient medical evidence to establish the need for additional medical treatment related to her accepted employment conditions. The evidence and argument she submitted did not raise a substantial question concerning the correctness of OWCP's decision. Appellant submitted an undated three-page document which contains the signature of Dr. Durany, an attending physician, and of Mr. Mattox, an attending physician assistant. However, other than the signatures, the report is comprised of symbols and does not contain any recognizable words. Appellant also submitted an undated, unsigned one-page document, bearing the title, "Letter of Reconsideration," which has words in place of the symbols found on the first page of above-noted document produced by Dr. Durany and Mr. Mattox. The document contains a history of appellant's August 11, 2005 employment injury and limited findings from an examination conducted on an unspecified date.¹⁹

The Board finds that neither of these documents constitutes probative medical evidence because neither document constitutes a legible report signed by a physician within the meaning of FECA. The Board has held that a medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as a physician as defined in 5 U.S.C. § 8101(2) and reports lacking proper identification do not constitute probative medical evidence.²⁰ The signed three-page document is illegible and the legible one-page document is not signed.

The underlying issue in this case medical in nature, *i.e.*, whether appellant has submitted sufficient medical evidence to demonstrate that she sustained a recurrence, on or after April 15, 2015, of the need for additional medical treatment due to her accepted employment conditions. Given that the above-noted documents do not constitute probative medical evidence under FECA, they do not raise a substantial question as to the correctness of OWCP's May 9, 2016 decision.²¹ The Board finds that appellant's application for review does not demonstrate on its face that OWCP committed error when it found in its May 9, 2016 decision that she did not

¹⁸ See *supra* note 10.

¹⁹ In the history section, it was noted that appellant had a cyst growing from 2005 until 2016 when Dr. Kuhn removed a large ping pong ball size cyst from the second digit of the right hand (index finger). It was also indicated that the "continued right hand and finger injuries are directly related to the accident on May 11, 2005 while working for the department [of] finance and accounting service in Indianapolis, Indiana." The Board notes that OWCP has not accepted that appellant sustained a work-related right index finger injury and that there is no indication in the record that appellant sustained a work-related injury on May 11, 2005.

²⁰ *C.B.*, Docket No. 09-2027 (issued May 12, 2010).

²¹ Appellant did not submit any argument in connection with her reconsideration request other than her assertion that the evidence she submitted upon reconsideration established her claim.

establish a recurrence of the need for medical treatment.²² As noted, clear evidence of error is intended to represent a difficult standard²³ and appellant has not met this standard in this case.

For these reasons, the evidence submitted by appellant does not raise a substantial question concerning the correctness of OWCP's May 9, 2016 decision and OWCP properly determined that appellant did not demonstrate clear evidence of error in that decision.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the August 4, 2017 decision of the Office of Workers' Compensation Program is affirmed.

Issued: March 16, 2018
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

²² See *S.F.*, Docket No. 09-0270 (issued August 26, 2009).

²³ See *supra* note 12.